IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 921 OF 2003

IN

EXECUTION APPLICATION NO. 153 OF 2002

IN

ARBITRATION PETITION NO. 66 OF 2001

IN

ARBITRATION AWARD DATED 18.10.1999

O.O.O. Patriot .. Petitioners.

vs.

Phulchand Exports Ltd., .. Respondents.

And

Oriental Bank of Commerce. .. Applicants/ Intervenors

Mr. H.N. Thakore with Ms. C. Sonpal i/by
M/s. Thakore Zariwala & Associates
for petitioners.

Mr. A.M. Jaykar for respondents.

CORAM : S.U.KAMDAR, J.

DATE : 28th MARCH, 2005.

P.C.

1. The present chamber summons is taken out for setting aside the order passed by the Commissioner

for Taking Accounts dated 9.7.2003. By the said order the Commissioner for Taking Accounts has rejected the claim of the applicant herein that they are the mortgagee in respect of the office premises bearing No. 67, Bajaj Bhavan Premises Co-operative Society Ltd., Nariman Point, Mumbai.

2. It is the case of the applicant that they are the successor in title of the bank, namely Global Trust Bank Ltd., and as such they are entitled to prosecute all the claims which were pending at the time of merger of the said Global Trust bank Ltd. with the applicant herein. It is the further case of the applicant that for the loan lent and advanced by the Global Trust Bank Ltd., to the respondent, namely, Phulchand Exports Limited, the said company mortgaged the office premises being Office No. 67, Bajaj Bhavan Premises Co-operative Society Ltd., situated on the 6th floor of the premises represented by 10 shares of Rs. 50/- each bearing share certificate no. 41 and 122 and bearing distinctive nos. 201 to 205 and 606 to 610. It is the case of the applicant that originally there was also a mortgage in respect of the premises bearing no. 89 in the very same society which has been since cancelled. The applicant has raised the aforesaid claim before the Commissioner for Taking Accounts in execution proceeding initiated by the petitioners who are the holders of the above decree

in their favour. Since the Commissioner rejected the claim of the applicant herein the present chamber summons has been taken out challenging the said order passed by the Commissioner. The said chamber summons is served on the petitioners award decree holder and an affidavit of service dated 28.3.2005 proving service is taken on record. In spite of the service, none appears for the petitioners. The learned counsel appearing for the respondents supports the case of the applicant that there is a valid mortgage in respect of premises no. 67 in the said building in favour of the original Global Trust Bank Limited and the applicants are entitled to the same as successor in title thereto.

3. Essentially the Commissioner for taking Accounts has rejected the claim of the applicant on the following grounds :-

(1) That the mortgage is not registered with the Sub-Registrar of Assurances.

(2) The registration of charge with the Registrar of Companies is prior to the date of notoratisation of the said document.

(3) That the applicant has failed to establish the claim towards the mortgage debt because they did not produce the books of accounts certified by the

Bankers Evidence Act.

(4) The charge in respect of the said premises has been cancelled by the society.

4. The learned counsel for the applicant has contended that each of the aforesaid contentions are erroneous in law. It has been contended that the mortgage being equitable mortgage does not require registration in law. It is true that an equitable mortgage executed by deposit of title deeds does not require any registration under the Registration Act. such a mortgage is a valid mortgage in favour of the applicant herein.

5. So far as the second contention is concerned, I do not find any merit in the same because the learned counsel has contended that the document is duly registered with the Registrar of Companies and the Registrar of Companies has registered the said charge in respect of the office premises No. 67 situated in the said building and in view thereof the said contention about delay in notoratisation is without any merit.

6. In so far as the cancellation of the mortgage in the record of the society is concerned, the learned counsel for the petitioners has drawn my attention to pages 36 and 37 of the affidavit in

support of the chamber summons and has contended that in fact in so far as the office premises no. 67 is concerned, the mortgage continues. The cancellation recorded on page 37 of the affidavit is only in respect of the office premises no. 89. In view thereof, the finding of the Commissioner that even in respect of the Office premises no. 67 charge is cancelled in the record of the society is unsustainable in law.

7. The last contention that the books of accounts produced are not certified by the Bankers Evidence Act. The same also has no merit whatsoever because the applicant has produced their books of accounts before the Commissioner. The Commissioner for Taking Accounts is not a Court before whom a party is required to produce the books of accounts duly certified under the Bankers Evidence Act. The strict rule of evidence are not applicable to the proceedings before the Commissioner for Taking Accounts.

8. In view of my aforesaid findings, I set aside the order of the Commissioner for Taking Accounts. I also direct the Commissioner to include the claim of the applicant as a mortgagee in the proclamation of the sale under Order 21 Rule 66. I also direct that after the sale proceeds are received the claim of the applicant should be paid

first before the amount is disbursed to the plaintiff under the decree. The aforesaid chamber summons disposed off accordingly. However, there shall be no order as to costs.